



22 August 2023

Attorney-General

**Privacy Amendment Bill [PCO 25226/10.0] – Consistency with the New Zealand
Bill of Rights Act 1990**
Our Ref: ATT395/386

1. We have considered whether the Privacy Amendment Bill (**Bill**) is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (**NZBORA**). A copy of the version of the draft Bill considered is **enclosed**.
2. The Amendment Bill amends the Privacy Act 2020 (**the Privacy Act**) by providing for a new notification obligation on an agency when it collects personal information indirectly.
3. We have concluded the Bill limits the right to freedom of expression, but nevertheless appears to be consistent with NZBORA as it imposes no more than a justified limit on that right.
4. If we become aware of any changes to the draft Bill that are material to this advice before the Bill is introduced, we will provide updated advice.

The Bill

5. The key purpose of the Bill is to improve transparency for individuals about the collection of their personal information and better enable them to exercise their privacy rights.
6. To achieve this purpose, clause 4 introduces new information privacy principle 3A (**IPP3A**) to the existing information privacy principles. IPP3A relates to the indirect collection of personal information. It requires an agency (public or private)¹ to notify an individual of a range of matters when collecting that person's information indirectly.²

¹ The term 'agency' is used in the Privacy Act to mean a person, business, or organisation that collects and holds personal information about other people. An individual acting in their personal or domestic capacity is not an agency. See ss 4, 8 and 9 of the Privacy Act 2020 for the full definition of 'agency'.

² If information is collected directly, the requirement to notify an individual already exists under information privacy principle three.

7. The requirement will apply to information collected from 1 June 2025. Agencies which indirectly collect information will be required to take reasonable steps to ensure the individual is aware of:
 - 7.1 the fact the information has been collected;
 - 7.2 the purpose of collection;
 - 7.3 the intended recipients of the information;
 - 7.4 the name and address of the agency that collected the information and the agency holding the information;
 - 7.5 if the collection is authorised or required by or under the law, the relevant law; and
 - 7.6 the rights of access to, and correction of, information provided by the information privacy principles.

8. An agency need not take those steps if the individual has previously been made aware of all of those points. Nor is it necessary for an agency to take those steps if the agency believes, on reasonable grounds:
 - 8.1 that non-compliance would not prejudice the interests of the individual;
or
 - 8.2 that the information is publicly available; or
 - 8.3 that non-compliance is necessary:
 - 8.3.1 to avoid prejudice to the maintenance of law by any public sector agency, including prejudice to the prevention, detection, investigation, prosecution, and punishment of offences; or
 - 8.3.2 for the enforcement of a law that imposes a pecuniary penalty;
or
 - 8.3.3 for the protection of public revenue; or
 - 8.3.4 for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
 - 8.4 that compliance would prejudice the purposes of the collection; or
 - 8.5 that compliance is not reasonably practicable in the circumstances of the particular case; or

- 8.6 that compliance would prejudice the security or defence of New Zealand or the intentional relations of the Government of New Zealand; or
 - 8.7 that compliance would reveal a trade secret; or
 - 8.8 that compliance would cause a serious threat to public health or safety or the health or safety of another individual; or
 - 8.9 that the information will not be used in a form in which the individual concerned is identified or will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned.
9. Like some of the other IPPs, IPP3A would not apply to personal information collected or held for or in connection with personal or domestic affairs, nor to personal information collected by intelligence and security agencies.
 10. Part 2 of the Bill makes a number of technical amendments to the Privacy Act. Of note, clause 13 extends two of the grounds on which an agency may refuse access to personal information:
 - 10.1 Access may currently be refused if the personal information is of an individual who is younger than 16 and disclosure would be contrary to that person's interests. This ground is extended to permit refusal if the disclosure would be contrary to the interests of any other individual who is under 16 years and to whom the information also relates.
 - 10.2 Access may currently be refused if disclosure would likely prejudice the safe custody or rehabilitation of the individual whose personal information it is, if that person has been convicted of an offence or is, or has been, detained in custody. This ground is extended to permit refusal if the disclosure would likely prejudice the safe custody or rehabilitation of any other individual to whom the information relates who has been convicted of an offence or is, or has been, detained in custody.

Analysis

11. Section 14 of NZBORA provides that "everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."
12. Section 14 is limited in two ways by the Bill:
 - 12.1 The right to freedom of expression has been interpreted as including the right not to be compelled to say certain things or provide certain

information.³ The Bill creates an obligation on agencies to provide certain information to individuals when they collect their personal information indirectly (subject to the exceptions). To the extent those agencies have the benefit of the s 14 right to freedom of expression, that right will be limited.⁴

12.2 The right to freedom of expression also includes the right to receive information.⁵ Whilst IPP3A is rights-enhancing in this regard, because it will result in the receipt of more information about personal information than currently occurs, the exceptions embedded in IPP3A do mean that in certain circumstances the right to receive information will be limited. The same is true of the extensions in clause 13 to the existing grounds of refusing access to personal information.

13. We consider that these prima-facie limits on s 14 are justified in terms of s 5 of NZBORA. Section 5 provides that the right to freedom of expression may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The section 5 consideration is considered first in respect of the compelled speech and second in respect of the right to receive information.

Right not to be compelled to provide information

14. The purpose of IPP3A is to improve transparency for individuals about the collection of their personal information and better enable them to exercise their privacy rights. It aligns with the existing policy of the Privacy Act, which is to provide transparency to a person affected by the collection of personal information.⁶ That purpose is important regardless of whether the information has been collected directly or indirectly from the individual. Indeed, the need for transparency is even stronger in respect of indirectly collected information as the individual concerned is less likely to be aware of who has indirectly collected their information. That is a purpose of sufficient importance to justify some limit on the freedom not to be compelled to provide information.

15. IPP3A is rationally connected to that purpose. By requiring notification of indirect collection, the Bill will enhance the ability of individuals to understand who holds

³ For example, *Slaight Communications v Davidson* (1989) 59 DLR (4th) 416 (SCC); *Wooley v Maynard* 430 US 705 (1977). This position has been recognised in New Zealand. See, for example, *Low Volume Technical Association Incorporated v Brett* [2017] NZHC 2846, [2018] 2 NZLR 587 at [104]. Although the judgment was overturned on appeal, the Court of Appeal accepted that compelled publication limited freedom of expression (*Low Volume Technical Association Incorporated v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [40]-[41]). See also *New Zealand Health Professionals Alliance Inc v Attorney-General* [2021] NZHC 2510 at [129]. CLO advice regarding the Bill of Rights Act consistency of the Privacy Bill 2018 (now Privacy Act) proceeded on this same basis.

⁴ By s 29 of NZBORA, s 14 applies for the benefit of all legal persons and all natural persons. To the extent the agencies are public entities, they may not benefit from the s 14 right, and this issue may not arise.

⁵ *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [69].

⁶ *R v Alsford* [2017] 1 NZLR 710 (HC) at [140]. See also [144]: “An evident policy in the legislation is that individuals should know if personal information about them is being collected and have the opportunity to control its use and obtain correction if it is inaccurate.”

their personal information, and their ability to access or correct such information.

16. The notification requirement does not limit the right not to impart information more than reasonably necessary. There are two aspects to this. First, the obligation is only to take such steps as are reasonable in the circumstances. Second, the exceptions narrow the occasions on which an agency will be compelled to provide information. Through these features, Parliament strikes a balance between transparency and competing interests. That balance may be drawn a number of different ways, but the balance struck by the Bill would fall within a range of reasonable alternatives by which Parliament might achieve its objective.
17. Overall, the limited prima-facie limit on the right not to be compelled to provide information is proportionate to the importance of increasing transparency about the collection of personal information and facilitating the exercise of associated privacy rights. Any harms caused by the measure to rights-holders do not clearly outweigh the benefits of the measure.

Right to receive information

18. As noted above, the introduction of IPP3A gives a practical mechanism that enhances the ability for individuals to manifest their right to receive information. That said, the exceptions to the notification obligation (and the proviso that only reasonable steps need to be taken by agencies) pull in the other direction.
19. These exceptions align with existing exceptions to other information privacy principles or obligations in the Privacy Act. They are consistent with one of the purposes of the Privacy Act, which includes “providing a framework for protecting an individual’s right to privacy of personal information, including the right of an individual to access their personal information, while recognising that other rights and interests may at times also need to be taken into account.”
20. The exceptions serve a variety of important purposes, including protecting New Zealand’s national security and international relations, law enforcement activities, the interests of children, the functioning of the legal system, reducing risks to other people, enabling anonymised statistical analysis and research and ensuring the obligations under the Privacy Act remain workable and practical for agencies. The interests which are protected by the exceptions are sufficiently important to justify some limit on the freedom to receive information.
21. Each exception is rationally connected to its purpose.
22. The exceptions ought not limit the right more than is reasonably necessary of the achievement of Parliament’s purpose. The only exception that gives reason to pause on this aspect of the analysis is that which is triggered if an agency believes, on reasonable grounds, that compliance is not reasonably practicable in the circumstances. It could be thought that this goes further than is necessary

because it prioritises practicability over the right to receive information. However, we note the exception does not apply simply if an agency believes that notifying is not practicable, but rather only if there are *reasonable* grounds for a belief that notification is not *reasonably* practicable. Thus there must be an objective basis for the belief and real reason to conclude notification is not practicable. In our view this exception (along with the others) is within the range of reasonable options available to Parliament when striking the balance between transparency and other rights and interests. IPP3A seeks to enhance transparency by imposing a new obligation on agencies but a reasonable quid-pro-quo is that the obligation must be workable, and agencies must be able to continue to go about their primary business.

23. Overall, IPP3A enhances the right to receive information. The prima-facie limit imposed by the exceptions is proportionate to the importance of the recognition they give to other rights and interests that need to be balanced in the privacy framework.
24. In terms of the clause 13 extensions to the grounds upon which an agency can refuse access to personal information, which also impose a prima-facie limit on the right to receive information:
 - 24.1 Both extensions are designed to apply when the interests of young people, or matters of safety, would be endangered by disclosure. Protecting safety and the interests of young people are objectives that are sufficiently important to warrant a limit on freedom of expression.
 - 24.2 On their terms, the extensions are rationally connected to those purposes and do not limit the right to receive information more than is necessary for the achievement of those objectives.
 - 24.3 Overall, the impact on the right is proportionate to the importance of the protection of individuals served by these extensions.

Conclusion

25. For those reasons, although the Bill prima facie limits the right to freedom of expression, it does not appear to be inconsistent with NZBORA as the limits are justified under s 5. We note this aligns with Crown Law's conclusion that the framework implemented by the information privacy principles in the Privacy Act itself constitutes a justified limit on s 14 of NZBORA.⁷
26. We do not consider any of the other rights and freedoms affirmed in NZBORA are engaged by the Bill.

⁷ See advice concerning the Privacy Bill, 9 March 2018, available at <https://www.justice.govt.nz/assets/bora-privacy-bill.pdf>.

Review of this advice

- 27. In accordance with Crown Law's policies, this advice has been peer reviewed by Jason Varuhas, Senior Crown Counsel.



Matt McMennamin
Crown Counsel

Encl.

Noted / Approved / Not Approved


Hon David Parker
Attorney-General
23 / 8 /2023